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STATUTES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.———

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Corporation, *Petitioner,*

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY, a Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, American Automobile Insurance Company, respectfully shows to the Court:

I.
SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action by a judgment creditor of one insured under an automobile liability insurance policy to recover the amount of its judgment from the liability insurer. The action was commenced in the District Court of the United States for the District of Kansas by W. C. McBride, Inc., a Delaware corporation, against respondent, Employers Mutual Casualty Corporation, an Iowa corporation. Subsequently, American Automobile Insurance Company, a Missouri corporation, and subrogee of W. C. McBride, Inc. was substituted as the party plaintiff. Also joined as defendants were the trustees of Miller-Morgan Motor Company, a dissolved Kansas corporation. (R. 56, 57) Jurisdiction was based upon diversity of citizenship. The trustees of Miller-Morgan Motor Company defaulted. After a trial of the action judgment was rendered in favor of your petitioner and against the respondent for $10,228.95 (R. 61). This judgment was reversed by the Circuit Court of Appeals for the Tenth Circuit. (R. 125).

On August 11, 1936, the respondent Employers Mutual Casualty Company, through its soliciting agent, issued and delivered to the Miller-Morgan Motor Company, a motor sales and repair agency, its public liability insurance policy covering a "courtesy car" owned by Miller-Morgan and intended for the temporary use of its customers while their automobiles were undergoing repair in Miller-Morgan's establishment. (R. 16, 57) At the specific request of Miller-Morgan the policy contained a so-called omnibus or additional insured clause,

which in addition to the named assured, covered the liability of any person while using the atomobile with the permission of the named assured (R. 57, 58). Soon thereafter, and on August 28, 1936, the soliciting agent for respondent Employers Mutual Casualty Company obtained the policy from Miller-Morgan for the purpose of making some changes. The policy was returned to Miller-Morgan with a rider attached which voided the omnibus clause in the policy and confined the coverage thereunder to Miller-Morgan Motor Company, the named insured. Miller-Morgan did not have knowledge of the attachment of the rider and did not consent thereto. It accepted the return of the policy as changed under the mistaken belief that the policy fully covered the operations of the courtesy car. There was no consideration for the change in the policy. (R. 58)

After the return of the policy as changed, and on September 5, 1936, Miller-Morgan temporarily loaned the courtesy car to its customer James L. Strunk, an employee of W. C. McBride, Inc. On that day, Strunk, while driving the car in the course of his employment with W. C. McBride, Inc., was involved in an automobile accident resulting in injuries to one Kenneth Stanfield. Stanfield instituted suit against W. C. McBride, Inc. and Strunk for personal injuries. Strunk notified the respondent, contending that he, Strunk, was an additional insured under the omnibus clause of the policy, which respondent had issued to Miller-Morgan Motor Company. Respondent denied liability and refused to defend on the ground that the policy in force on September 5, 1936, did not cover the automobile while operated by anyone other than the named insured Miller-Morgan Motor Company. W. C. McBride, Inc., through its in-

suror, your petitioner, American Automobile Insurance Company, effected a settlement with Stanfield which was judicially approved, paid the judgment, and W. C. McBride, Inc. was granted a judgment over against Strunk for the same amount. (R. 59)

W. C. McBride, Inc., as the judgment creditor of Strunk, instituted garnishment proceedings against respondent Employers Mutual Casualty Company on the theory that the change in the policy, being without consideration and lacking the assent of Miller-Morgan Motor Company, was a nullity and that by reason thereof, Strunk was an additional assured under the omnibus clause of the policy at the time of the accident, and that respondent was therefore bound to respond under the terms of the policy (R. 60). The named assured, Miller-Morgan Motor Company was not a party to this garnishment proceeding. (R. 104, *Stanfield v. McBride, Inc.,* 149 Kan. 567, 88 P. 2d 1002.) The Kansas trial court dismissed the garnishment proceedings holding that Strunk was not within the coverage of the policy unless it could be reformed to comply with its original terms and that reformation could not be had under the issues framed in a garnishment proceeding. (R. 60, 104)

From the judgment dismissing the garnishment proceeding W. C. McBride, Inc., whose position petitioner occupies, took an appeal to the Supreme Court of Kansas. (R. 60, 122) No cross-appeal was taken by the respondent from the state trial court's failure to render a judgment in its favor upon the merits. (R. 105, *Stanfield v. McBride, Inc.,* 149 Kan. 567, 88 P. 2d. 1002) The Kansas Supreme Court simply affirmed the judgment of the Kansas trial court dismissing the garnishment proceeding. (R. 60, 124) The court's opinion is reported

under the title *Stanfield v. McBride, Inc.*, 149 Kan. 567, 88 P. 2d. 1002. The opinion and judgment of the Kansas Supreme Court are included in the record only by reference. (R. 105)

The present action was filed during the pendency of the appeal in the Supreme Court of Kansas. (R. 60) The complaint alleged the facts substantially as above related except that it made no reference to the state court proceeding. (R. 7-13) The action was not tried until some time after the decision of the Kansas Supreme Court in *Stanfield v. McBride, Inc.*, supra. (R. 32)

The facts above related were found by the trial court in the present action. (R. 56-61) In its opinion the Circuit Court of Appeals held that the findings of the trial court were supported by substantial evidence and were conclusive in that court. (R. 123).

The only question presented to the Circuit Court of Appeals upon respondent's appeal from the judgment rendered against it by the trial court was the interpretation and effect of the decision of the Kansas Supreme Court in *Stanfield v. McBride, Inc.*, supra. (R. 121)

The District Court held that the decision of the Kansas Supreme Court was no bar to petitioner's right to maintain the action. (R. 61) The Circuit Court of Appeals held that this conclusion of law by the District Court was erroneous and reversed the judgment upon the ground that in *Stanfield v. McBride, Inc.*, supra, the Kansas Supreme Court laid down a rule of law that petitioner had no standing to assert that the change in the policy was invalid. (R. 124, 125)

The interpretation given by the Circuit Court of Appeals to the opinion and judgment of the Kansas Supreme Court was something of an anomaly. The court

held that the judgment of the Kansas Supreme Court was not *res judicata* of the issues in the present action because the court went no farther than to affirm a dismissal otherwise than upon the merits. (R. 124, paragraph 1.) The court further held, however, that in its opinion the Kansas Supreme Court intended to lay down a binding rule of law to the effect that a third party beneficiary under an insurance contract has no standing to assert the invalidity of a unilateral change unassented to by the insured and unsupported by a consideration, the effect of which was to cut off the rights of the third party beneficiary. (R. 124, second paragraph, et seq.) The court further interpreted the opinion as applying to every action even though all the parties to the contract were before the court; although the only matter actually before the Kansas Supreme Court and covered by its judgment was whether the invalidity of the attempted change in the contract could be litigated in a garnishment proceeding to which the other party to the contract, Miller-Morgan Motor Company, was not a party. (R. 124, first paragraph, et seq.) Although the Circuit Court of Appeals held that the opinion of the Kansas Supreme Court went beyond the matter presented to and decided by it, the extension of the opinion to matters not decided was said not to be dicta because the opinion was stated in "language too clear and relevant to be called dicta." (R. 124, first paragraph.)

II.
THE QUESTIONS INVOLVED.

This recitation brings us to the questions involved:

1. Whether the Circuit Court of Appeals was correct in its holding that in *Stanfield v. McBride, Inc.*, supra, the Kansas Supreme Court laid down a rule of law that a third party beneficiary of an insurance contract, having no vested interest, cannot assert that the policy was changed to eliminate his interest by an unilateral act of the insurer, unknown to and unassented to by the insured and unsupported by a consideration, even though all the parties to the contract are before the court.

2. Assuming the correctness of the interpretation of the Circuit Court of Appeals stated in the preceding question, whether the courts of the United States are bound by dicta of a local court where such dicta is in conflict with an earlier decision of the local court upon the precise point.

3. Whether the courts of the United States are required to accord to dicta of a local appellate court the effect of an authoritative decision where the local court holds that dicta in its opinions are binding upon no one.

III.
JURISDICTION.

This court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of 28 U.S.C., sec. 347. The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 6, 1942. (R. 125) The date of this petition for certiorari is February 2, 1943.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals held that the judgment of the Kansas Supreme Court was not upon the merits, but that it was simply an affirmance of a judgment dismissing a garnishment proceeding because the relief sought could not be obtained in that form of proceeding. (R. 124, paragraph 1) It also held that the only thing in the opinion of the Kansas Supreme Court which was necessary to that judgment was the determination made by the Kansas Supreme Court that the relief sought was outside the issues raised by the garnishment proceeding. (R. 124, lines 1-6) Since the judgment was limited to this one point any expressions in the opinion to the effect that one in petitioner's position could not assert that the unilateral change in the policy was a nullity in a civil action in which all the parties to the contract were joined was necessarily dicta, whether it was positively stated or not. This dicta was in direct conflict with an earlier Kansas decision upon the precise point in *Sluder v. The National Americans,* 101 Kan. 320, 166 P. 482. The Sluder case is not mentioned in the opinion in *Stanfield v. McBride, Inc.* This court's decision in Erie *Rly. Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1118, 58 S. Ct. 817, requires the lower Federal Courts to ascertain the local law in cases based upon diversity of citizenship. It is a matter of importance for these courts to have the guidance of this court upon the question of whether they are bound by dicta of a local appellate court where that dicta is in conflict with an earlier decision of the local appellate court upon the precise point.

2. It is a settled rule of law in Kansas that dicta of the Kansas Supreme Court is binding upon no one. (*State ex rel. v. Stonehouse Drainage District,* 152 Kan. 188, 102 P. 2d 1017.) It is a matter of importance that this court determine whether the Federal courts in applying local law are required or permitted to give to dicta of a local appellate court the effect of an authoritative decision when such dicta is not entitled to weight in the local courts. This is particularly important where the dicta conflicts with an earlier decision of the local court upon the precise point.

3. The Circuit Court of Appeals has given to dicta of the Kansas Supreme Court the binding effect of an authoritative decision. In doing so the decision of the Circuit Court of Appeals for the Tenth Circuit in the present case is in conflict with decisions of the Circuit Court of Appeals for the Fourth Circuit in the cases of *New England Mut. Life Ins. Company v. Mitchell,* 4 Cir., 118 F. 2d. 414, certiorari denied, 314 U. S. 629, 86 L. Ed. (Adv. Ops.) 72, 62 S. Ct. 60 and *Powell v. Maryland Trust Company,* 4 Cir., 125 F. 2d 260, certiorari denied 316 U. S. 671, 86 L. Ed. (Adv. Ops.) 937, 62 S. Ct. 1041.

4. The Circuit Court of Appeals completely misinterpreted the opinion of the Kansas Supreme Court in *Stanfield v. McBride Inc.,* supra. The Kansas court decided only the question presented to it—whether the invalidity of respondent's unilateral change in the contract could be litigated in a garnishment proceeding to which the insured, Miller-Morgan Motor Company was not a party. The Kansas court had no intention of overruling its earlier decision in *Sluder v. The National Americans,* 101 Kan. 320 166 P. 482 which was not mentioned in

Stanfield v. McBride, Inc., supra. The question of local law decided by the Circuit Court of Appeals is of great importance. Under the decision of the Circuit Court of Appeals a life insurer, engaged in business in Kansas but incorporated in some other state, may by fraud and without consideration induce the insured to surrender his policy, yet when the interest of the beneficiary attaches upon the death of the insured he cannot assert the invalidity of the cancellation of the policy. The decision of the Circuit Court of Appeals interprets the law of Kansas in such a way as to sanction fraud and recognize a wrong without a remedy in the face of a direct decision to the contrary in *Sluder v. The National Americans,* supra.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was entitled in that court Employers Mutual Casualty Company, Appellant versus American Automobile Insurance Company, Appellee, to the end that said cause may be reviewed and determined by this court as provided by law, and that the judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

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